## II.

# THE JUDICIAL ASPECT OF INTERNATIONAL LAW.—ARBITRATION.

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Whilst the principles of international law have been enlarging their influence and developing, in their application to the great variety of questions which have arisen from time to time out of the advance of civilization during the past hundred years, and their authority has been continuously extended as the result of a wider recognition throughout the world, by mutual agreement, of the rights of one people, in its international and sovereign capacity, toward another people, no means of promoting harmony has been discovered which has proved to be so efficient as the recourse to arbitration in the settlement of international disputes.

The employment of it in the nineteenth century increased at certain periods with such rapidity that it has been shown by a comparative statement to have doubled in the number of cases in each period of ten years in comparison with that of the same length of time immediately preceding it; and if we were to enumerate the nations which have submitted their disagreements to its adjustment we should include not only the United States but the great Powers of Europe as well—Great Britain, France, Austria-Hungary, Italy, Germany and Russia, as also almost every country in the world—for instance, we should have, besides Spain, Denmark, Belgium, Holland, Norway and Sweden—Turkey, Greece, Persia, China, Japan, Mexico and all the republics of Central and South America.

Statesmen of all the cabinets of the world have turned to this method of arriving at conclusions which shall safeguard national honor and content public opinion on both sides of a controversy, without a breach of international relations and without recourse to the force of arms.

We must admit, unhappily, from the evidence that is forced upon us by the spectacle of the great conflict now going on amongst the

nations of Europe, that arbitration has not been able always to prevent war; that, even with its conciliatory processes of mediation and intervention, it has been swept aside by war; that nothing has been devised which, in the present attitude of the peoples of the earth in their relations to each other, and in the existing conditions of the human mind, can abolish war. But, just as international law itself if forced beyond a given point is found to have its limitations, so its component parts, of which arbitration is one, can not be expected to attain to that which no human agency has as yet made possible.

That it is a method of avoiding conflict and preserving peace, there can be no possible doubt; nor can we fail to admit its efficacy when we consider how frequently heretofore it has intervened amidst the passions of men, and how, even in our own case, when the interests and temper of the people were drawing them to the verge of a conflict it has turned aside from us the frightful disaster of a modern war.

It may be said, indeed, with honor to the generous purposes of the American people in their public dealings with other nations, that this principle of fair and just consideration of the claims of right on both sides has been taken as the basis upon which they have rested their contentions in the international controversies that have presented themselves, ever since the establishment of the independence of the United States.

It appears in the plan for the adjustment of the differences subsisting between ourselves and Great Britain immediately after the Revolutionary War, and for the establishment of our boundary lines along the River St. Croix mentioned in the treaty of peace; and we see it in the provision made by Mr. Jay's treaty, to that end, in 1794, that the disputed questions should be referred to the final decision of commissioners, one of whom is to be appointed by the King of Great Britain, one by the President of the United States, by and with the advice and consent of the Senate, and these two commissioners are to agree upon the choice of a third; or, if they can not so agree, they shall each propose one person, and of the two names so proposed one shall be drawn by lot in the presence of the two original commissioners. The three commissioners so appointed shall be sworn impartially to examine and decide the said question, ac-

cording to such evidence as shall respectively be laid before them on the part of the British government and of the United States.

We have here the principles of arbitral adjustment fully developed at the outset, and we have employed it repeatedly in the same manner through an exceedingly interesting and important series of negotiations by which not only the St. Croix dispute was adjusted, but the whole boundary line along our northern frontier has been established, from the Atlantic ocean to the Pacific; the northeastern boundary by Mr. Webster and Lord Ashburton in 1842,—the line from the Great Lakes to the Rocky Mountains, and from thence to the ocean. So that when the San Juan water boundary was finally determined by the decision of the German Emperor, as arbitrator, in 1872, General Grant was able to report to Congress in his annual message, in December of that year, that:

"This award confirms the United States in their claim to the important islands lying between the Continent and Vancouver's Island, . . . and leaves us, for the first time in the history of the United States as a nation, without a question of disputed boundary between our territory and the possessions of Great Britain on this continent."

The success of this kind of negotiation, and perhaps a growing habit of thought which resulted from it and attached itself to it, very naturally increased the value, as it also extended the influence upon men's minds, of the advantages to everybody concerned, that is to be gained through the amicable adjustment of international disputes where that course is possible. Thus it came to be generally accepted, that arbitration is the most direct and effective method of settling such controversies, especially in cases where actual national integrity or national honor is not at stake; and the immediate effect of this was made evident by the greatly increased ratio of arbitral adjustment, already noted, in the course of the nineteenth century, in which substantially all the nations of the world have taken part.

The high point was reached, however, one may safely say, in considering all the circumstances, that the greatest political and moral result that the world had ever seen to come out of an international settlement was attained by the Geneva Tribunal in its composure of the difficulties then existing between the United States and Great Britain which had arisen out of the *Alabama* claims, both on account

of the extremely grave situation in which the two nations found themselves, the delicacy of the relations involved which touched the national pride of each in a manner quite capable of producing acts of hostility at any moment, and the importance of the questions of right and of injury which were actually at issue as the cause of the dispute. In some respects also the ground was new; and this was an untraveled road which seemed at the time to be quite impossible of approach, even after the inducements held out by the United States government. Mr. Adams announced, in fact, in his note to the British Foreign office that he was: "directed to say that there is no fair and equitable form of conventional arbitrament to which the United States would not be willing to submit."

But, even after the lapse of two years, Lord Russell's mind was still so completely in revolt against the idea that it could be possible for Great Britain to entrust to the decision of a foreign power such a delicate question of national responsibility, that he declared abruptly:

"It appears to her Majesty's government that there are but two questions by which the claim of compensation could be tested; the one is: Have the British government acted with due diligence, in good faith and honesty, in the maintenance of the neutrality they proclaimed? The other is: Have the law officers of the Crown properly understood the foreign enlistment act, when they declined, in June, 1862, to advise the detention and seizure of the *Alabama?*

"Neither of these questions could be put to a foreign government with any regard to the dignity and character of the British Crown and the British nation. Her Majesty's government are the sole guardians of their own honor. They cannot admit that they have acted with bad faith in maintaining the neutrality they professed. The law officers of the Crown must be held to be better interpreters of a British statute than any foreign government can be presumed to be. Her Majesty's government must decline to make reparation and compensation for the captures made by the *Alabama.*"

On our side, in the meantime, Mr. Seward reflected, in his instructions to Mr. Adams, the intensely strong national feeling and the determination of the whole American people, when he declared that there was not a member of the government nor, so far as he knew, any citizen of the United States who expected that this country would in any case waive its demand upon the British government for the redress of wrongs committed in violation of international

law; "the massive grievance," as Mr. Sumner said, "under which the country had suffered for years, and the painful sense of wrong planted in the national heart."

It must be looked upon as the triumph of international forbearance and of the willingness upon the part of the two nations to compose amicably their differences, which turned aside the menace and reëstablished peaceful relations at the moment when we were upon the brink of war. Its influence and its lasting moral effect were unquestionably greater, not only as between ourselves and Great Britain but also in their direct bearing upon all the Powers of the world, than could probably have been produced by any result obtainable through the arbitrament of war. The most remarkable instance in this connection is perhaps the agreement reached in regard to the famous "Three Rules" of the Treaty of Washington relating to the "due diligence" that a neutral government is bound to employ in preventing belligerent cruisers from arming and equipping or from departing from its waters, which was the basis of the American case relating to the *Alabama* claims. For the British commissioners were finally instructed to declare that they could not assent to those rules as a statement of principles of international law in force at the time when the *Alabama* claims arose, but that

> "Her Majesty's government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agreed that in deciding the questions between the two countries arising out of those claims, the arbitrator should assume that her Majesty's government had undertaken to act upon the principles set forth in the rules in question."

Thus it was possible to employ the method of arbitration in order to prepare a common meeting-ground upon which the nations could approach each other as equals, and treat without prejudice—each recognizing the right of the other to present its claims as they appeared from its own national point of view, and to seek justice.

Probably nothing of the kind had ever influenced the world like it before; and it marks a stage of progress from which the world can never recede; for arbitration is a growth which in the affairs of men indicates the advancing steps of civilization.

We have, of course, as the great example and proof of this, the

conferences at the Hague, to which the nations went in 1899 and 1907, ready to make concessions each of its own personal interests in the effort to attain to results beneficial to all.

Whilst the reduction of the heavy burden of the armaments then resting upon the peoples of Europe was the motive of the Emperor of Russia in calling the First Conference together, and whilst the Conference did not find itself able even to bring that subject to serious consideration by the Powers, it reached definite results in other directions which must be regarded as very remarkable steps forward in the progress of mankind.

With its memorable declaration that, "in order to obviate as much as possible the recourse to force in the relations between states, the contracting Powers agree to use their best efforts to insure the pacific settlement of international disputes;" and "for the purpose of facilitating immediate recourse to arbitration in cases which have not yielded to diplomatic effort," the conference established a permanent court, accessible at all times and competent for all arbitral questions, as a world tribunal before which nations may appear as litigants and have their cases heard.

The Conference of 1907 enlarged the field of peaceful endeavor still further by providing for more extended efforts toward arbitral adjustment through the good offices and mediation of other Powers; so that,

> "in case of serious disagreement or dispute, before an appeal to arms, the Powers agree to have recourse, as far as circumstances will permit, to the good offices or mediation of one or more friendly Powers. And, independently of this recourse, the contracting Powers deem it expedient and desirable that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, proffer their good offices or mediation to the states in conflict;"

a very great variance from the older customs of Europe which is of especial importance because of the concessions which it implies. For, in the extreme sensitiveness of national honor and the jealously guarded distinction of national personality, a war was looked upon formerly as a subject that related solely to the belligerents engaged and their friends and allies, in which no one would venture to interfere who was not interested in it, any more than one would inter-

fere with the participants and their respective seconds in a duel, expecting not to be considered impertinent or not to give offence.

But the Conference agreed, and this marks the enlargement of human thought, that Powers which are strangers to the dispute may take the initiative, that they shall have the right to offer their good offices or mediation, even during the course of hostilities; and that the exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the states at variance.

The judicial element of international law has thus become, in a sense, the paramount influence in the establishment and adjustment of international relations. It is this which will direct the course of such relations in the future; and upon it will be largely built up the international law of the future. The Conferences at the Hague have erected a new and substantial fabric; so that we have now, provided by its court of arbitration, a tribunal of recognized competence and fixed rules of procedure, open to all; whilst the contracting Powers formally agreed, at its inception, that the award of the court of arbitration, duly pronounced, "puts an end to the dispute definitely and without appeal."

Our own government entered during Mr. Roosevelt's administration, whilst Mr. Root was Secretary of State, into separate conventions with several of the great European Powers, Great Britain, for instance, France, Spain, Russia, and with the republics of South America, which provide, under regulations agreed to at the Hague, that

"Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the permanent court of arbitration, provided that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties.

"In each individual case, however, before appealing to the permanent court, the contracting parties shall conclude a special agreement defining the matter in dispute, the scope of the powers of the arbitrators and the periods to be fixed for the formation of the arbitral tribunal and the several stages of the procedure. Each of these special agreements must be made, however,

under the terms of these treaties, by the President of the United States with the advice and consent of the Senate."

It is interesting to note that, from the point of view of the foreign relations with the peoples of other countries, the government of the United States has taken part in proceedings in arbitration, where awards have been made by the arbitrators, in 83 cases altogether; for example, with France 2, with Russia 1, with Spain 6, with Great Britain 17, with Germany 1, with China 3, with Brazil 3, etc., and the results of these different settlements are very well worth notice also in this connection; for, the aggregate of all these awards is $92,855,000.00, of which about sixty-nine millions were in our favor, and about twenty-four millions against us. So that, taken altogether, nearly 75 per cent. of all the awards have been made in favor of the claims of the United States government, and 25 per cent. opposed to them.

So much for arbitration in the past. If we look forward the future presents many problems to the statesmen and judges and lawyers of all the Powers, which will have to be met by them when order has been restored once more and men resume the habits of civilized life after this period of conflict which we are now passing through. The world requires order and tranquillity as the conditions under which civilization may continue to progress. After all the sacrifice, and all the terrible suffering and distress entailed by this armed conflict, in spite of the courage and devotion and patriotism so freely shown on every side, the one prominent intellectual gain that we and all men hope to see as the result, will be the conviction of the futility of war, and renewed confidence in the precepts of international law. The rules of adjustment and forbearance and concession which led the nations to the Hague, must be restored and must point the way again during our generation, let us hope, and for beyond our day, to international well-being through the aid of law and justice and arbitration of disputes, with mutual respect, toward the peace of the world.

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